



POLICE DEPARTMENT

September 17, 2015

MEMORANDUM FOR: Police Commissioner

Re: Detective Joseph Derby
Tax Registry No. 901441
Warrant Section
Disciplinary Case No. 2014-11415

The above-named member of the Department appeared before me on March 19 and June 12, 2015, charged with the following:

1. Said Detective Joseph Derby, on or about January 25, 2013, at approximately 0730 hours, while assigned to the Warrants Section and on duty [REDACTED] engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said residence without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

2. Said Detective Joseph Derby, on or about January 25, 2013, at approximately 0730 hours, while assigned to the Warrants Section and on duty [REDACTED] engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched said residence without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Simone Manigo, Esq. Respondent was represented by Michael LaCondi, Esq.

Respondent pleaded Not Guilty to the charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification No. 1. CCRB moved to dismiss Specification No. 2.

SUMMARY OF THE EVIDENCE PRESENTEDIntroduction

It is undisputed that on January 25, 2013, Respondent and Detective Michael Cosme, who was acting as Respondent's back-up, were on duty, in plainclothes, assigned to the [REDACTED] Warrant Squad. At about 0730 hours, Respondent and Cosme entered the New York City Housing Authority (NYCHA) building at [REDACTED] [REDACTED] and approached the front door of apartment [REDACTED] because Respondent was seeking to arrest Person A based on a complaint report that he had committed a robbery [REDACTED] [REDACTED] Person A lived in apartment [REDACTED] with his mother, Person B.

CCRB's Case

CCRB called Person B and Sabrina King as witnesses.

Pers on B, who has resided in apartment [REDACTED] for 17 years, recalled that about 7:50 a.m., she awoke to the sound of loud banging on the door to her apartment which sounded like an object was being banged against her door. As she walked toward the door, she saw Person A in the living room. The peephole on the door had been knocked out and she was able to see the faces of two white men through the hole in the door where the peephole had been. Before Person B reached the door, the two men pushed

the door open and entered the apartment. She had not said anything to the men and they had not said anything to her. She testified that she was terrified because she did not know who the men were and she had not given them permission to enter her apartment. The two men headed straight toward Person A in the living room and then took him outside.

She testified that her apartment door was made of steel, that it had two brass locks and a sliding chain, and that it had no damage before this incident. As a result of this incident, the top lock on the door had been broken off and Person B had to buy a new lock [CCRB Exhibit (CCRBX) 4 is a receipt from the Home Depot for the new lock]. Person B was unable to completely close the door until NYCHA repaired it. NYCHA later removed the door and replaced it because it was not hanging properly on the door hinges. [CCRBX 2A-C are photos of the new door]. Person B confirmed that she did not report this incident to CCRB until May 28, 2013. She explained her delay was the result of the fact that she was very upset about what had happened and "couldn't really think."

Sabrina King, who resides in apartment [REDACTED] which is across the hall from apartment [REDACTED] has been Person B's neighbor for 12 years. [CCRBX 1A is a photograph of King's door. CCRBX 1B and C are photographs of the hallway between apartments [REDACTED] and [REDACTED]. On the morning of this incident, King was awoken by an extremely loud banging noise. She stepped into the hallway where she saw four Caucasian males standing in front of Person B's door, kicking and banging on the door, and asking for Person A to come outside. She did not immediately realize that the men were police officers because she saw no shields. One of them hit the door with a black object that made a metallic sound. King saw the door's peephole fall off due to the knocking which left an open hole in the door. The knocking also broke the doorknob and caused dents in

the door. King did not hear any voice emanate from inside Person B's apartment. After the men had knocked on the door of apartment [REDACTED] for over an hour, the door opened and the men immediately rushed inside. King confirmed that the door [REDACTED] [REDACTED] had opened inward but that she was unable to see who had opened the door.

After Person A was indicted, his attorney filed a motion to suppress in [REDACTED] [REDACTED] Supreme Court alleging that Person A had been illegally arrested inside his residence by Respondent. Judicial Hearing Officer (JHO) Thomas A. Demakos conducted a suppression hearing. Respondent testified at the hearing that after he asked Person B if he could come in and speak with Person A, Person B opened the door, stepped back, and let the officers enter. Person B and King both testified at the hearing on Person A's behalf in a manner consistent with their testimony at this trial. JHO Demakos issued a decision on July 16, 2014 (CCRBX 3) in which he made the following "findings of fact":

Payton v. New York (445 US 473 [1980]) prohibits the police from crossing the threshold of a suspect's home in order to effect a warrantless arrest, absent either exigent circumstances or consent. . . . In light of the findings of the Civilian Complaint Review Board that the allegations leveled against Detective Derby in connection with this matter had been substantiated, and in view of the credible testimony from the defense witnesses [King and Person B], I find Detective Derby's testimony insufficient to carry the People's burden with respect to demonstrating consent to enter the defendant's home. Thus, the police entry to arrest the defendant [Person A] constituted a *Payton* violation.

Respondent's Case

Respondent called Detective Michael Cosme as a witness and testified on his own behalf.

Detective Cosme testified that after he and Respondent first knocked on the door of apartment [REDACTED] they could hear someone approaching the door but when they asked for Person A, the "conversation went blank." Their repeated banging on the front door caused the peephole to fall off (Tr. p. 148-149) and through the hole in the door where the peephole had been they were able to see Person A running around inside the apartment. Person B opened the door and Cosme saw Respondent speak briefly with Person B. Respondent "proceeded to go inside and from those actions it looked like it was voluntary to go in." Cosme entered behind Respondent and they arrested Person A. Cosme denied knocking on the door with a metal object, breaking the locks, or damaging the door in any way other than the peephole fall off. Cosme did not hear Respondent's conversation with Person B. They banged repeatedly on the door "every minute" for about 45 minutes before Person B opened it. (Tr. p. 148-149)

Respondent testified that after Person B came to the door, he identified himself and stated that he was looking for Person A. When Person B told him that she did not know if Person A was home, Respondent replied, "Ma'am, he's home, he's been running around your apartment like a jack rabbit. Could you please open the door so we can come [in] and talk to you and Person A?" Person B then opened the door and stepped back. Respondent interpreted this as an indication that he had her permission to enter. The officers walked in. Person B asked if they had a warrant. Respondent explained that although he did not have a warrant, there was an open complaint report and detectives [REDACTED] [REDACTED] needed to speak with Person A. Person B did not say anything else. By that point Cosme had already handcuffed Person A. As they left the apartment, he did not

notice any damage to the door locks. Respondent recalled that he had knocked on the door off and on for about one hour. He did not use any object to knock on the door.

FINDINGS AND ANALYSIS

Specification No. 1

Respondent is charged with entering Apartment [REDACTED] without sufficient legal authority. Respondent testified at this trial that he entered this residence after a woman who came to the door voluntarily consented to his entry. However, Respondent acknowledged that the woman who opened the door did not verbally consent to his entry. Rather, he asserted that she had “stepped back” and that he had then assumed that she was granting him permission to enter.

Consent to enter to enter a private residence “is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implied, overt or subtle.”¹

Respondent acknowledged that he had been knocking on the door of Apartment [REDACTED] off and on for about an hour before the door was finally opened. Detective Cosme testified that he and Respondent had repeatedly “banged” on Person B's door “like every minute” for at least 45 minutes before the door was finally opened and that they had banged so hard that it had caused the peephole to fall off the door. (Tr. p. 148-149).

Since consent is valid only where “the means by which officers seek consent to enter are not coercive,”² based on Respondent's and Cosme's own descriptions of their repeated, lengthy, banging on the door, and in the absence of an express verbal grant of

¹ Legal Bureau Bulletin, Vol. 18, No. 3, p. 2 (May 26, 1988) discussing the New York Court of Appeals decision in *People v. Gonzalez*, 39 NY2d 122.

² Legal Bureau Bulletin, Vol. 44, No. 2 (Jan., 2014).

permission to enter, Respondent's assumption, based on an alleged single physical movement by Person B, that he had been granted permission to enter constituted an insufficient basis for him to reasonably conclude that he had obtained truly voluntary consent to enter. Thus, I find Respondent guilty of entering Apartment [REDACTED] without sufficient legal authority because I find that he did not take sufficient care to ensure that his action of entering Apartment [REDACTED] was proper under the circumstances presented here.

It is based on the above analysis that I find Respondent guilty. Although the CCRB Administrative Prosecutor offered in evidence the JHO's decision regarding Person A's motion to suppress evidence, the JHO's duty was to make findings of fact relevant to determining the admissibility of evidence at Person A's criminal trial. Since the JHO was not charged with determining whether Respondent had committed misconduct for which he should be disciplined by the Department, the JHO's finding that Respondent had committed a "Payton violation" was not dispositive as to whether Respondent's entry constituted actionable disciplinary misconduct.

Respondent is found Guilty of Specification No. 1.

Specification No. 2

The CCRB Administrative Prosecutor stated that she was moving to dismiss Specification No. 2. It is recommended that this motion to dismiss be granted.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 240 (1974).

Respondent was appointed to the Department on June 30, 1992. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

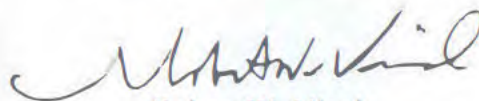
Respondent has been found Guilty of having entered a residence without sufficient legal authority. The CCRB Administrative Prosecutor recommended that Respondent forfeit five vacation days as a penalty.

In fashioning a penalty recommendation I have taken into consideration the fact that Respondent's misconduct did not have an adverse impact on the criminal prosecution of Person A since the JHO found that the post-arrest identification of Person A and the post-arrest questioning of Person A were "sufficiently attenuated" from Respondent's "Payton violation."

I have also taken into consideration that Respondent is a 23-year member of the Department who has never previously had a CCRB allegation substantiated against him; who has no formal disciplinary record; and who has received consistently good performance evaluations. Thus, Respondent's action here appears to be an aberration from his normal conduct.

Therefore, it is recommended that Respondent receive a reprimand as a penalty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner – Trials

APPROVED

JAN 08 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials

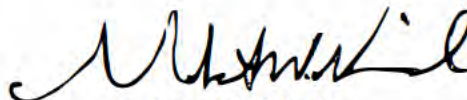
To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM

POLICE OFFICER JOSEPH DERBY
TAX REGISTRY NO. 901441
DISCIPLINARY CASE NO. 2014-11415

Respondent received an overall rating of 4.5 on his 2014-2015 annual performance evaluation and 4.5 on his 2013-2014 annual evaluation and 4.0 on his 2012-2013 annual evaluation. He has no medals. [REDACTED]
[REDACTED]. He has no prior formal disciplinary record and no monitoring records.

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner - Trials